

STATE OF MICHIGAN  
COURT OF APPEALS

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THOMAS GUASTELLO,  
Plaintiff-Appellee,

UNPUBLISHED  
May 3, 2005

v

STAPLES, INC.,

Defendant,

No. 251188  
Macomb Circuit Court  
LC No. 03-001307-CZ

and

LASCO DEVELOPMENT CORPORATION,

Defendant-Appellant.

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Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant Lasco Development Corporation appeals by leave granted the September 8, 2003, order denying its motion to dismiss plaintiff's claims against it for lack of personal jurisdiction. We reverse and remand.

Lasco, a Texas corporation, built a store building in Carbondale, Illinois that it rented to defendant Staples, Inc., on a fifteen-year lease. In 1997 Lasco sold the building to plaintiff, a Michigan resident. As part of that sale Lasco and plaintiff entered into a separate assignment and assumption agreement whereby Lasco assigned its landlord's interest in the lease to plaintiff. That agreement provides that Lasco will indemnify and hold plaintiff harmless against "all losses . . . and liabilities which may be suffered by or asserted against" plaintiff by reason of Lasco's "failure to perform . . . all or any of the landlord's obligations . . . under the lease." In March 2001 Staples started complaining to plaintiff of loose floor tiles at the Carbondale store, a condition it attributed to faulty construction. Plaintiff passed these complaints on to Lasco. Lasco failed to fix the floor tiles or pay for repairs. Staples replaced the defective floor tiles of the Carbondale store in December 2001 and withheld approximately \$46,000 rent from plaintiff to cover the cost of those repairs.

Plaintiff filed a complaint against Lasco and Staples in March 2003, alleging in part that Lasco breached the assignment and assumption contract by failing to indemnify plaintiff for the defective floor claim made by Staples.<sup>1</sup> Lasco moved to dismiss plaintiff's claim for lack of personal jurisdiction, arguing that it had none of the relevant contacts with the state of Michigan that would allow the circuit court to exercise personal jurisdiction over it. In support of its motion Lasco presented an affidavit from its president, Larry Seligmann, stating that Lasco is a Texas corporation that does not have any offices or employees in Michigan and does not own any property in Michigan. The affidavit also states that Lasco has never systematically or continuously carried on part of its general business in Michigan, that its employees did not enter the state for the purpose of contracting with plaintiff, and that employees communicated with plaintiff solely by telephone, fax, or mail. The affidavit further states that Lasco did not contract to insure any personal, property, or risk located in Michigan and did not enter into a contract to provide services in Michigan. Plaintiff's position was that, by entering into the contract, Lasco accrued the necessary contacts with Michigan to provide jurisdiction here under Michigan's long-arm statute, MCL 600.715. The trial court denied Lasco's motion to dismiss for lack of jurisdiction, stating simply that it was "satisfied that there are sufficient minimum contacts, and there is limited personal jurisdiction under MCL 600.715."

On appeal, Lasco argues that the trial court erred in determining that Lasco had sufficient minimum contacts with Michigan to give Michigan jurisdiction. Because we agree that jurisdiction cannot be permitted in this case under the Constitution of the United States, we need not determine whether jurisdiction would be permitted by Michigan's long-arm statute, MCL 600.715. *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 262-263 & n 1; 597 NW2d 227 (1999). The Due Process Clause of the Fourteenth Amendment limits a state's power to exercise jurisdiction over out-of-state defendants to only those defendants who have purposefully established "minimum contacts" in the forum state and to whom a finding of jurisdiction would comport with traditional notions of "fair play and substantial justice." *Jeffrey v Rapid American Corp.*, 448 Mich 178, 185-186, 529 NW2d 644 (1995), citing *Int'l Shoe Co v Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945). Whether a trial court has personal jurisdiction over a party is reviewed de novo. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 165-166; 677 NW2d 874 (2003).

With respect to personal jurisdiction, federal due process mandates that the defendant purposefully establish minimum contacts in the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe, supra* at 326 US 316; *Starbrite Distributing, Inc v Excelda Mfg Co*, 454 Mich 302, 308; 562 NW2d 640 (1997) (citations omitted). The minimum contacts analysis focuses on the relationship among the defendant, the forum, and the litigation. Whether exercise of personal jurisdiction over a nonresident defendant in a given case is consistent with due process involves consideration of three questions: (1) has the defendant purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws; (2) does the cause of action arise from the defendant's activities in the state; and (3) are the defendant's

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<sup>1</sup> There is no indication in the record that Staples pursued litigation against plaintiff.

activities so substantially connected with Michigan that they make the exercise of jurisdiction over the defendant reasonable. *Jeffrey, supra* at 186; *Electrolines, supra* at 167.

The question presented is whether Lasco's agreement to indemnify and defend plaintiff for losses incurred as a result of Lasco's "failure to perform . . . all or any of the landlord's obligations" arising out of Illinois property is sufficient to establish minimum contacts with plaintiff's home state for purposes of jurisdiction. Under the facts of this case, we find that there were not sufficient minimum contacts between Lasco and the State of Michigan to make jurisdiction in Michigan proper.

The entry of a contract with a Michigan resident is alone insufficient to show that the defendant "purposefully availed itself of the 'benefits and protections' of Michigan law." *Kerry Steel, Inc v Paragon Industries, Inc*, 106 F3d 147, 149-150 (CA 6, 1997). The mere fact that Lasco entered into the agreement with plaintiff does not mean that Lasco purposefully availed itself of the "benefits and protections" of Michigan law. As the Court explained in *Burger King Corp v Rudzewicz*, 471 US 462, 478; 105 S Ct 2174; 85 L Ed 2d 528 (1985), "an individual's contract with an out-of-state party alone" cannot "automatically establish minimum contacts."

The agreement to defend and indemnify does not represent purposeful direction of activities toward the forum state contemplated by the due process clause. "Purposeful availment" is "something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities." *Jeffrey, supra* at 187-188. Here, Lasco sold a piece of commercial property located in Illinois to a buyer who just happened to reside in Michigan and agreed to indemnify and defend the buyer for "all losses . . . and liabilities which may be suffered by or asserted against" plaintiff by reason of Lasco's "failure to perform . . . all or any of the landlord's obligations . . . under the lease." This was not "a deliberate undertaking to do or cause an act or thing to be done in Michigan." Lasco did not undertake any type of affirmative activities in Michigan except for communicating with plaintiff by mail, fax, or telephone. Although the indemnification agreement certainly contemplates the possibility of litigation, Lasco reasonably could expect that actions against plaintiff arising as a result of Lasco's breach of its landlord's duties would be brought in Illinois, where the property is located, not in Michigan. It would follow that Lasco reasonably could expect that any third-party action to defend and indemnify would similarly be brought in Illinois. We do not find the agreement at issue to be a substantial connection between Lasco and the State of Michigan. Lasco's activities are not so substantially connected with Michigan that they make the exercise of jurisdiction over Lasco reasonable.

In sum, we conclude that the record does not support an assertion of personal jurisdiction over Lasco. The record does not reflect that Lasco has sufficient minimum contacts with Michigan such that an assertion of personal jurisdiction would comport with due process.

Reversed and remanded with instructions to dismiss the claims against Lasco for lack of personal jurisdiction. Jurisdiction is not retained.

/s/ Kurtis T. Wilder  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly